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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BINGYI WANG,

Plaintiff and Appellant,

v.

A1 PROTECTIVE SERVICES, INC.,

Defendant and Respondent.

A135178

(San Francisco City & County
Super. Ct. No. CGC-11-516030)

Plaintiff Bingyi Wang was employed on an irregular basis as a security guard by defendant A1 Protective Services, Inc. (A1). Following his termination from employment, Wang filed a claim with the Labor Commissioner for unpaid wages and waiting time penalties. After the hearing officer rejected his contentions, Wang filed for review with the superior court. Following a trial de novo, the trial judge reached the same conclusions as the hearing officer and entered judgment for A1. We affirm.

I. BACKGROUND

On August 17, 2010, Wang filed a claim with the Labor Commissioner for unpaid wages of \$156.09, plus waiting time penalties. According to the decision of the hearing officer, Wang was employed by A1 as a security guard under an oral employment agreement from March 29, 2007 through October 2, 2009. He was paid a rate of \$11.54 per hour when working at government sites and \$10 per hour otherwise. Rather than working a regular schedule, he was given short-term assignments by phone and completed his own time sheets.

The hearing officer examined Wang's time sheets, analyzed several contested entries in the context of the evidence presented at the hearing, and concluded on each occasion Wang had either been properly compensated or overpaid. The officer also found claims for regular wages prior to August 17, 2008 and overtime wages prior to August 17, 2007 barred by the statute of limitations and rejected a claim for sick time, reasoning A1 had no legal obligation to compensate Wang for time lost due to sickness. Because he was fully paid on the day of his termination, the officer also dismissed Wang's claim for waiting time penalties. Accordingly, the hearing officer awarded no damages or penalties.

Wang appealed the Labor Commissioner's decision to the superior court, and, as required by Labor Code section 98.2, he was provided a trial de novo. (*Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 762.) In a written decision, the trial court stated that, as a result of recalculations, Wang was requesting \$203.59 in unpaid wages, as well as the waiting time penalties. The court reached the same conclusion as the Labor Commissioner regarding the statute of limitations, rejecting Wang's claim to have been employed under a written agreement. Again, like the Labor Commissioner, the trial court reviewed the claims not time-barred and found that, in every case, Wang was either properly compensated or overpaid and was not entitled to waiting time penalties. The court therefore entered judgment for A1.

II. DISCUSSION

Wang has appealed the trial court's decision, representing himself on appeal. A1 has not filed an opposition, but it has requested an opportunity to appear and argue the matter. Plaintiff has not provided us with a copy of the transcript of the testimony before the trial court, but we have a copy of the exhibits that were submitted.

We consider each of Wang's arguments individually, reviewing the trial court's conclusions of law de novo and its findings of fact for substantial evidence. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.)

Wang first contends he was underpaid for the pay period August 1 to 15, 2007. As mentioned above, the trial court found any claim for wages during this period to be

barred by the statute of limitations. We find no error in this conclusion, which is not addressed by Wang. In the absence of a written agreement, a claim for overtime is governed by the three-year statute of Code of Civil Procedure section 338, subdivision (a) (*Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 570, fn. 2, overturned by statute on other grounds, Stats. 2012, ch. 820, § 1, p. 6519; *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 405), while a claim for regular wages is governed by the two-year statute of limitations of Code of Civil Procedure section 339, subdivision (1) (*Sublett v. Henry's etc. Lunch* (1942) 21 Cal.2d 273, 277). Although Wang contended he was employed under a written agreement, he submitted to the trial court only two pages from A1's policy manual. No signed agreement was produced, and A1's bookkeeper testified Wang's employment agreement was oral. The trial court's finding of an oral agreement was therefore supported by substantial evidence.

The statute of limitations ran from the date of Wang's filing of a claim for wages, August 17, 2010. Because there was no written employment agreement, Wang's claims for overtime wages prior to August 17, 2007 are barred, as are any claims for regular wages prior to August 17, 2008. As a result, Wang's claims relating to wages during the period August 1 to 15, 2007 are barred.

Wang next raises his pay for the period August 16 to 31, 2007. Wang claims he was not paid for four hours of overtime during this period, all worked after August 17.¹ As the trial court found, Wang's time records show he worked 97 hours during this pay period, four hours of which were overtime. The total owing was \$990, but he was paid \$1,010, plus, according to the hearing officer, a later additional payment of \$65. Wang was therefore compensated fully (and more) for the overtime he claims. Wang's argument for underpayment appears to combine time worked during this and the immediately prior pay period, since he claims 105 hours worked, of which 22.5 hours

¹ The statute of limitations would bar any claim for regular wages during this time period, but Wang does not appear to make any claim for regular wages. His claims for overtime relate to time worked on or after August 17, 2007 and are therefore allowed.

were overtime. There is simply no basis in the record to support this number of hours worked during the pay period August 16 to 31, 2007.

Wang withdraws his claim for overtime based on two hours of show-up pay he was given on December 25, 2008, in addition to eight hours of regular pay.

Wang claims he was originally paid for four hours on July 25, 2009, but A1 later rescinded the payment when it paid him for his work on July 29 of that year. As to this dispute, the hearing officer held, “On July 25, 2009, Plaintiff failed to report to work at 3:30 pm. Instead, he reported at 11:30 pm without placing a call to his supervisor and claimed that he worked from 11:30 pm to 12:15 am.” Before the trial court, A1’s bookkeeper testified Wang would show up for work at times he was not scheduled. The documents in the appellate record confirm that when Wang showed up for the graveyard shift on July 25, another worker showed up as well, and Wang left after 45 minutes. Based on the foregoing, we conclude there is substantial evidence to support the trial court’s finding on no wages due for that date because Wang was not scheduled for work.

For the dates September 4 and 12, 2009, Wang worked at 1650 Mission Street. While he concedes he was paid for this work, he contends this location was a government site, for which he should have been paid an extra \$1.54 per hour. The trial court found Wang “presented no evidence to substantiate his claim that he should have been paid at the rate of \$11.54 per hour[.]” In his brief, Wang claims the location was the “Department of Building Inspection, SF,” but we can consider only evidence properly introduced before the trial court. Statements made in appellate briefs cannot be considered as evidence. We have found no evidence in the record explaining what type of entity is located at 1650 Mission Street. As a result, we must affirm the ruling of the trial court for these dates.

Wang does not repeat his claims for sick pay or waiting time penalties.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.